IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of the City of Monroe; MONROE CITY COUNCIL; RANDY PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J. ENSLEN, ROSEMARY B. MATHEWS, and LARRY WAYNE ADCOCK, Members of the Monroe City Council; SARA CAMPBELL, City Clerk,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Middle District of Georgia Athens Division

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Whether preclearance occurs under Section 5 of the Voting Rights Act where the Attorney General receives actual notice of an unprecleared voting practice and conducts a prompt, in-depth analysis of that voting practice then affirmatively decides to neither interpose a Section 5 objection nor request a Section 5 submission.

II. Whether the Attorney General may be legally or equitably barred from pursuing a remedy under Section 5 of the Voting Rights Act where the Attorney General has actual notice of an unprecleared voting practice and conducts an in-depth analysis of that voting practice yet fails to pursue a Section 5 remedy for eighteen years.

III. Whether the Attorney General may utilize Section 5 of the Voting Rights Act to achieve a Section 2 remedy where there is an absence of evidence that the voting practice at issue intentionally discriminates against minority voters.

IV. Whether the three judge panel erred in holding that the Attorney General's preclearance of the 1968 Municipal Elections Code which required the City to use majority vote did not also preclear the City's use of majority vote.

PARTIES

All parties to the proceeding below are:

United States of America

City of Monroe, Georgia

Harry Knight, In His Official Capacity as Mayor of the City of Monroe

Monroe City Council:

Randy Peppers, In His Official Capacity as Member of the Monroe City Council

Jerry Smith, In His Official Capacity as Member of the Monroe City Council

Hugh Bolton, In His Official Capacity as Member of the Monroe City Council

Phillip J. Enslen, In His Official Capacity as Member of the Monroe City Council

Rosemary B. Mathews, In Her Official Capacity as Member of the Monroe City Council

Larry Wayne Adcock, In His Official Capacity as Member of the Monroe City Council

Sara Campbell, In her Official Capacity as City Clerk for the City of Monroe

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No. ——

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JURISDICTIONAL STATEMENT

OPINION BELOW

The Memorandum Order and Opinion of the three judge panel of the United States District Court for the Middle District of Georgia holding that the City of Monroe, its City Council and Mayor are enjoined from utilizing majority vote in mayoral elections until such

time as Section 5 preclearance is obtained is reproduced at App. A, pp. 1a-37a and App. B, pp. 38a, 39a respectively.

JURISDICTION

This is an appeal from an Order and Judgment entered April 21, 1997, of the three judge court enjoining the City of Monroe, its City Council and Mayor from conducting mayoral elections by majority vote until such time as the City obtains Section 5 preclearance for majority vote. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTORY PROVISIONS INVOLVED

This appeal involves Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c. The text of these statutes are set forth at App. E, pp. 44a-46a.

STATEMENT OF THE CASE

Proceedings Below. The complaint in this action was filed on June 3, 1994. Plaintiff challenged under Section 2 and Section 5 of the Voting Rights Act the City of Monroe's at-large, majority vote method of electing the City Council and the majority vote method of electing the Mayor.

In 1995, the parties reached a settlement regarding the method of electing the City Council. The City of Monroe submitted a plan to the Attorney General which was precleared under Section 5. The new City Council election format requires majority vote elections; however, the Attorney General refused to preclear majority vote for the Mayor.

After resolving the method of electing the City Council, the sole remaining issue in the lawsuit was whether the City of Monroe was required to submit the majority vote method of electing the Mayor for Section 5 preclearance. On January 4, 1995, the parties filed cross-

motions for summary judgment on the Section 5 mayoral issue. The three judge panel heard oral argument on the motions on August 8, 1996. At oral argument, the three judge panel requested post argument briefs. That briefing was complete on September 5, 1996.

On April 15, 1997, the three judge panel filed its Order and Memorandum Opinion finding in favor of the United States on its Section 5 claims as to the election for the office of Mayor. On April 21, 1997, the three judge panel entered its Judgment permanently enjoining the City of Monroe, its Council and Mayor from utilizing majority vote to elect the Mayor unless and until they obtained Section 5 preclearance.

On May 21, 1997, Defendants filed their Notice of Appeal. On June 24, 1997, Defendants filed their Motion to Stay enforcement of the injunction pending appeal. By Order dated June 30, 1997, the three judge panel denied Defendants' Motion to Stay. On July 15, 1997, Defendants filed an Application to Stay Enforcement of the Injunction with this Court.

Statement of the Facts. The factual findings contained in the three judge panel's Opinion are accurate as far as they go. However, the City of Monroe (hereinafter "the City") contends that those findings perhaps understate the Department of Justice's analysis of the City's use of majority vote in 1976. Thus, except as outlined in Substantial Question I of this Statement, the City does not dispute the three judge panel's factual findings. However, the City believes that a brief explanation of circumstances which led up to this litigation is important to a full understanding of the issues submitted for review.

The City is a subdivision of the State of Georgia located in Walton County. The City has a total population of 9,759 people of whom 3,991 (40.9%) are African-American. The City has a total voting age population of 6,915 individuals of whom 2,539 (36.7%) are African-American. From 1966 until July 1995, the City's Coun-

cil members were elected at-large by majority vote. The Mayor was likewise elected by majority vote.

In 1990, when the Attorney General first purported to "object" to the City's use of majority vote, the City and its elected officials began discussions with the Department of Justice to transform the City's at-large council system to a type of single-member system. In March 1992, the City submitted to the State of Georgia a proposed amendment to the City's charter which would have changed the at-large method of electing the Council to a six-member system with four single-member districts and two "super" districts. The two super districts comprised one half of the City. The proposal included ward and residency requirements and the Council and Mayor were to be elected by majority vote.

Two of the six proposed council districts were majority African-American districts which fairly corresponded to the African-American voting age population of 36.7%. The State of Georgia approved the charter amendment subject to preclearance by the Attorney General. Soon thereafter, the City submitted its plan to the Department of Justice for preclearance. After requesting and receiving from the City voluminous documents and after engaging in extensive communications with a small number of African-American citizens in Monroe, the Department of Justice rejected the City's proposed plan. A primary basis for the Department of Justice's rejection of the plan was that it did not contain three majority African-American districts as demanded by private advocates. After substantial pressure from the Department of Justice and threats of litigation, the Council again considered whether to acquiesce to the Department of Justice's demands for three majority African-American district in a six district format. When the City disagreed with the demands of the Department of Justice, the Department instituted this lawsuit.

Early in the litigation, the originating District Court judge held a telephonic status conference in which counsel

for the City explained the City's fruitless attempts to replace its at-large system with an appropriate single member district system. The City further suggested that the District Court require mediation or some form of alternative dispute resolution so that the parties could quickly and cost-effectively reach an acceptable method of electing the council. At the urging of the originating judge, the United States agreed to negotiate with the City. In those negotiations, the City proposed a "six and two" plan containing six single-member districts and two super districts. Three of the eight districts were majority African-American districts. As part of its plan, the City proposed that the council members be elected by majority vote. Although the Department of Justice challenged in this lawsuit the City's majority vote requirement for the Council, the Department of Justice agreed that majority vote was appropriate and supported, if not mandated, majority vote for the new Council format. In May 1995, the City submitted the "six and two" plan for preclearance and, in July 1995, the Attorney General granted preclearance. (App. A, pp. 11a, 12a).

As part of the settlement, the City requested preclearance for majority vote for the Mayor. The Department of Justice refused. Accordingly, the parties commenced litigation on the issue of whether preclearance for majority vote for the Mayor was required under Section 5 and the facts of this case. The parties set a briefing schedule for summary judgment and continued with discovery on the Section 5 issue. In discovery, the City sought documents withheld from discovery by the Department of Justice which related to the Department's 1976 analysis of the City's use of majority vote. The Department of Justice vigorously resisted the City's discovery requests on this issue and forced the City to file a motion to compel. The three judge panel granted the City's motion finding the *Howard* documents "extremely relevant" to the City's defenses. (S. App. 1-6). The Department of Justice then turned over the *Howard* documents.

As set forth in the three judge panel's Opinion, the Court rejected the City's contentions that the originating judge in *Howard* was correct on the effect of the preclearance of the 1968 Municipal Elections Code and further held that the Department of Justice could not be barred by equitable principals from pursuing Section 5 litigation against the City eighteen years after it had privately conducted an extensive factual and legal analysis of the City's use of majority vote and elected not to interpose an objection. The three judge panel entered judgment in favor of the United States enjoining the City from using majority vote to elect the Mayor until such time as Section 5 preclearance is obtained. (App. C, pp. 40a, 41a).

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. THIS COURT'S ANALYSIS IN *McCAIN v. LYBRAND* AFFORDS THE BASIS FOR FINDING THAT PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT OCCURS WHERE THE ATTORNEY GENERAL RECEIVES ACTUAL NOTICE OF AN UNPRECLEARED VOTING PRACTICE AND CONDUCTS A PROMPT, IN-DEPTH ANALYSIS OF THAT VOTING PRACTICE THEN AFFIRMATIVELY DECIDES TO NEITHER INTERPOSE A SECTION 5 OBJECTION NOR REQUEST A SECTION 5 SUBMISSION.

From 1976 until March 1995 when the three judge panel granted the City's Motion to Compel in this case, the Department of Justice has avoided acknowledging the existence and extent of its Section 5 deliberations in 1976 regarding the City's use of majority vote. However, as memorialized by documents in the Sealed Appendix, the City's use of majority vote was the subject of a vigorous and substantial Section 5 analysis by the Department of Justice in 1976. Two events triggered the Department's Section 5 analysis. First, on August 12, 1976,

approximately one week after the final order was entered in the *Howard* litigation, plaintiff's counsel in that case, David F. Walbert, sent a letter to Gerald Jones of the Voting Rights Section of the Department of Justice informing the Department of the *Howard* Court's July 29, 1976 ruling that the City's use of majority vote was mandated by the 1968 Georgia Municipal Elections Code. (App. G, pp. 54a-56a). Mr. Walbert asked the Department of Justice to intervene in the *Howard* litigation and appeal the matter to this Court. Mr. Walbert characterized the *Howard* Court's majority vote ruling as "one of general importance to most of the municipalities in the State" (App. G, pp. 54a-56a). Mr. Walbert requested that the Department of Justice "as the enforcer of Section V" either intervene in the *Howard* litigation or file a separate suit if the Department of Justice "agreed with our positions and would see fit to intervene." (App. G, pp. 54a-56).

Second, and coincidentally on the very same day, counsel for the City of Monroe submitted to the Department of Justice for Section 5 preclearance the annexation ordinances at issue in the *Howard* litigation. (App. A, p. 8a). In its August 12, 1976 Section 5 submission letter, the City expressly referenced the *Howard* litigation and even attached as exhibits to that letter copies of the relevant court orders. (App. A, p. 8a).

In response to Mr. Walbert's August 12, 1976 request that the Department of Justice intervene in the *Howard* suit, the Department of Justice initiated a thorough and sifting evaluation of the City's use of majority vote, the position of the parties in *Howard*, the propriety of intervening in the *Howard* litigation, and the propriety of interposing an objection to the City's use of majority vote. (S. App. pp. 7, 9-12, 13-20, 24-30, 31, 32, 32-43). Specifically, in a handwritten memo dated September 1, 1976, Gerald Jones instructed Voting Rights Section attorneys "to give the City's use of majority vote a 'prompt, in-depth' study to see if there is anything we can do

here." (S. App. p.7). As set forth in the Sealed Appendix, several substantial memoranda generated in response to Mr. Jones' directive demonstrate that a vigorous debate ensued in which the participants were divided on whether the *Howard* Court was correct in its majority vote ruling, whether the Department of Justice would intervene in *Howard*, or whether the Department would even bother to ask the City to submit the majority vote method of election for preclearance under Section 5. (S. App. pp. 9-12, 13-30, 24-30, 33-43).

One of the participants in the debate, David Hunter, prepared a draft "please submit" letter designed to inform the City that its use of majority vote must be submitted for Section 5 preclearance. (S. App., pp. 41-43). However, after considering the positions of the advocates in the internal deliberations and after circulating the "please submit" letter for review within the Department of Justice, the Attorney General elected not to object to the City's use of majority vote or intervene in the *Howard* suit. Moreover, the Attorney General elected not to request that the City submit the majority vote issue for preclearance even though the "please submit" letter was drafted, edited, and apparently in final form. (S. App., p. 32). This Section 5 determination is memorialized by the handwritten notation "NOT SENT" located prominently at the top of Mr. Hunter's "please submit" letter. (S. App., pp. 41-43). Thus, it is undisputed that no objection letter or "please submit" letter was ever sent. It is further undisputed that the Department of Justice let the issue lay dormant for fourteen years before purporting to interpose an "objection" to the City's use of majority vote (App. A, p. 10a) and eighteen years before filing a Section 5 lawsuit.

The Department of Justice's "prompt, in-depth" analysis of the majority vote preclearance issue was conducted in conjunction with the City's undisputedly "proper" Section 5 submission of the annexations at issue in the *Howard* suit. (App., pp. 8a-10a). As the three judge panel acknowledges, but attempts to minimize, a focal point of the Section 5 analysis of the annexations was the effect the annexations would have in the context of the City's use of majority vote. (App., p. 9a). On September 14, 1976, Mr. Walbert, who weighed in on the Section 5 debate on behalf of his clients, specifically asked the Attorney General to address whether the City met its burden under Section 5 in light of the alleged dilution effect of the City's majority vote requirement.

Taking Mr. Walbert's lead, J. Stanley Pottinger, Assistant Attorney General with the Department of Justice, sent the City a letter on October 13, 1977 objecting under Section 5 to two of the annexations. In that letter, Mr. Pottinger specifically stated that a Section 5 inquiry included the consideration of the "local electoral system". (App. A, p. 24a). Mr. Pottinger's analysis lead the Department of Justice to make a Section 5 objection on the grounds that "an at large system with residency and majority vote requirements" may make the annexations inappropriate under Section 5. Over the next year, the City provided information to the Department of Justice regarding the annexations. Finally, on November 25, 1977, the Department of Justice withdrew its objection to the annexations. (App. A., p. 9a). In reaching its conclusion, the Department of Justice specifically relied upon the demographic and electoral context of the City of Monroe. (App. A, pp. 9a, 10a, S. App., pp. 7-69).

From these undisputed facts, the three judge panel concluded that this Court's decision in *McCain vs. Lybrand*, 465 U.S. 236 (1984), controlled the analysis and required a finding that the City's use of majority vote had not been expressly or implicitly precleared in connection with the 1976 *Howard* litigation. (App. A., p. 22a). The City contends that *McCain* supports rather than under-

mines its position in this case. This Court's analysis in *McCain* was fundamentally predicated upon the distinction between preclearance based on constructive notice to the Attorney General of an unprecleared change and preclearance based on actual notice to the Attorney General followed by a substantitve analysis of that unprecleared change and a failure to act. The three judge panel dismissed this crucial distinction. (App. A, p. 24a, n.14.)

In *McCain*, this Court was required to determine whether an admittedly unprecleared 1966 South Carolina State law creating a new form of government for Edgefield County, South Carolina was precleared by implication when a 1971 and unrelated submission was precleared by the Attorney General. The submitting jurisdiction in that case argued that since the unprecleared 1966 charter was incorporated by reference and implication into the 1971 charter amendment, the Attorney General's preclearance of the 1971 charter amendment constituted tacit preclearance of the 1966 amendments. However, this Court rejected that argument because the record showed that the Attorney General either did not recognize that the 1966 act required preclearance or assumed that it had been precleared. In short, there was no evidence that the Attorney General had actual knowledge that the 1966 charter amendments constituted a change from prior practice and, therefore, had been denied an opportunity to pass on the voting change under Section 5. *McCain*, at 253-254.

In fact, this Court suggested in *McCain* that it would likely have found that preclearance had occurred if the Attorney General received actual knowledge of the unprecleared change, conducted a Section 5 analysis of that change, yet took no action to object to the change or request preclearance under Section 5:

> [I]t would require a wild flight of imagination to suggest that the Attorney General recognized that the 1966 Act affected changes which had required preclearance and had never been precleared and then did not ask state officials to explain the failure to preclear those changes but instead embarked on the task of gathering the information necessary to evaluate those alterations on his own rather than requesting state officials to provide the information to him as he had done regarding the changes made by the 1971 amendment. It is even more unlikely that he would have kept his consideration and approval of the changes made by the 1966 Act a secret from state officials in his letter preclearing the 1971 amendment. *McCain*, 465 U.S. at 254 [footnote omitted].

This Court further noted that "if the Attorney General was aware that the Act required preclearance and had never been precleared, his failure to request either an explanation or at least some additional information would be difficult to comprehend." *McCain*, 465 U.S. at 254. The hypothetical conduct of the Attorney General which this Court bluntly condemned in *McCain* is the reality of the Attorney General's conduct in this case.

As this Court suggested in *McCain*, Section 5 was designed to provide actual notice to the Attorney General of an unprecleared change to give the Attorney General an opportunity to either approve the change, object to the change, or further investigate the impact of the change. Such is the purpose of the "proper submission" rule laid out in *McCain*, *Allen v. State Board of Elections*, 393 U.S. 544 (1969), *United States vs. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) and *Clark v. Roemer*, 500 U.S. 646 (1991), each of which involved mere constructive notice of an unprecleared change. In the present case, the goal of Section 5 was accomplished. The Attorney General had an opportunity to, and in fact conducted an extensive evaluation of the City's use of majority vote and elected not to interpose an objection or exercise any Section 5 authority.

II. THE ATTORNEY GENERAL SHOULD BE LEGALLY OR EQUITABLY BARRED FROM PURSUING A REMEDY UNDER SECTION 5 OF THE VOTING RIGHTS ACT WHERE THE ATTORNEY GENERAL HAS ACTUAL NOTICE OF AN UNPRECLEARED VOTING PRACTICE AND CONDUCTS AN IN-DEPTH ANALYSIS OF THAT VOTING PRACTICE YET FAILS TO PURSUE A SECTION 5 REMEDY FOR EIGHTEEN YEARS.

The three judge panel held that the United States is simply immune from equitable defenses under Section 5 of the Voting Rights Act. (App. A., pp. 33a, 35a). The three judge panel's ruling on this issue is inconsistent with this Court's precedent, the Attorney General's own regulations which governed its obligations in 1976, and the very structure of Section 5 itself. This Court suggested that in the Title VII context, equitable remedies may be invoked against the E.E.O.C. where the E.E.O.C. has inordinately delayed in filing an action, thereby prejudicing the employers' ability to properly defend the suit. *Occidental Life Insurance Company v. E.E.O.C.*, 432 U.S. 355 (1977). The three judge panel properly noted that lower courts have relied on *Occidental Life* to dismiss E.E.O.C. actions on equitable grounds which have been inordinately delayed. The three judge panel, however, rejected the logic of the *Occidental Life* analysis in the Section 5 context. (App. A, pp. 30a-32a).

However, the very structure of Section 5 of the Voting Rights Act itself invites a finding of laches, estoppel, or waiver to bar the Government's Section 5 suit in this case. This case presents a far more compelling case for the application of equitable time-based defenses than Title VII. Under Section 5, where a submission has been made that is deemed to be proper by the Attorney General, the Attorney General has only sixty days within which to interpose an objection. 42 U.S.C. § 1973c. Under this Court's decision in *Morris v. Gressette*, 432 U.S. 491 (1977), if the Attorney General fails to enter an objection within the sixty day period for any reason whatsoever,

the voting change is deemed precleared as a matter of law. *Morris*, 432 U.S. at 502-503. The three judge panel apparently read Section 5 to require evidence that the Attorney General in fact embarked upon the supposed "difficult and complex decision that the shift from plurality to majority voting was not discriminatory in purpose or effect" before preclearance occurs. (App. A, pp. 22a-24a). However, contrary to the three judge panel's interpretation of Section 5, preclearance under the administrative option "is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect." *Morris*, 432 U.S. at 502. This Court properly observed in *Morris* that in the administrative preclearance process, "compliance with Section 5 is measured solely by the absence, for whatever reason of a timely objection on the part of the Attorney General." When the Attorney General fails to enter a timely objection, even through administrative neglect, "there is no further remedy provided by Section 5." *Morris*, 432 U.S. at 502, 503 citing *Allen v. State Board of Elections*, 393 U.S. 544, 549-550 (1969).

This Court has strictly interpreted Congress' sixty day deliberation period. This interpretation is consistent with this Court's recognition of "the potential severity of the § 5 remedy, the statutory language and the legislative history. . . ." of Section 5. *Morris*, 432 U.S. at 504. Thus, as the three judge panel accurately observed, if the Attorney General fails to interpose a timely objection within the sixty day deadline even through administrative neglect or error, the Attorney General is forever barred from pursuing a Section 5 remedy regarding the voting change at issue. (App. A, pp. 28a, 29a). Moreover, in the administrative neglect scenario, the voting change would be deemed precleared without any inquiry into whether the voting practice was free from discriminatory purpose or effect. If the Attorney General can be forever barred from pursuing a Section 5 remedy based on even an inadvertent failure to object in the administrative preclearance procedure, it certainly would not be inconsistent

to find that the Department of Justice's fourteen year failure to object and eighteen year failure to pursue a Section 5 remedy after actual notice and substantive evaluation of the unprecleared change would likewise act as a legal or equitable bar to its Section 5 claims.

Moreover, the Code of Federal Regulations applicable in 1976 relating to Section 5 submissions required the Attorney General to request the submission of voting changes from covered jurisdictions where the Attorney General had actual knowledge that a change had occurred but had not been submitted for preclearance. See 28 C.F.R. § 51.15(b) (1971) ("[i]f no submission has been made, the Attorney General shall advise the person or entity responsible for the alleged change of the duty to seek a declaratory judgment or to make a submission to the Attorney General before enforcement"). This regulation was mandatory, and it is undisputed that the Attorney General failed to abide by it. The three judge panel did not address this argument.

In rejecting the City's equitable defenses, the three judge panel placed great weight on the important nature of the public right for which the Attorney General is responsible. (App. A, p. 27a). However, the three judge panel disregarded the fact that under the Voting Rights Act, a Section 5 determination of preclearance whether through affirmative analysis or administrative neglect never deprives the government of its statutory right to file a Section 2 lawsuit to challenge an alleged discriminatory voting practice. Rather than exercise that option, the United States would prefer to place on the City the burden of proving an absence of discrimination relating to an electoral change which occurred thirty-one years ago and, in the City's view, had been finally resolved in litigation and through the Attorney General's own conduct in 1976.

The three judge panel also seemed concerned that allowing equitable defenses to be lodged against the government in Section 5 cases would "encourage jurisdictions aware of

existing, unprecleared changes not to submit those changes for immediate preclearance, but instead to comb through the files of the Department of Justice looking for evidence that might lead to a 'preclearance by estoppel.'" (App. A, p. 28a). The three judge panel's concern on this issue is misplaced. The three judge panel held in its discovery orders that the City had a right to review the Department of Justice's files where the Department placed its conduct in the Section 5 process at issue by filing a lawsuit eighteen years after conducting a Section 5 analysis of the voting practice at issue and after electing to waive its Section 5 prerogatives. (S. App., pp. 1-7). As the three judge panel acknowledged by its discovery rulings, that is a defendant's right in discovery in a civil lawsuit.

Moreover, if anything, the three judge panel's ruling in this case will be more likely to encourage the Department of Justice itself to "comb" through its old files to resurrect Section 5 issues where it would like to impose a Section 2 remedy but may be unable to prove a Section 2 violation. Such unwarranted deference to the Attorney General under Section 5 severely prejudices covered jurisdictions like the City which, due to the passage of time, would have no meanful way to defend or pursue the type of Section 5 suit that has been imposed upon it in this case.

III. THE ATTORNEY GENERAL MAY NOT UTILIZE SECTION 5 OF THE VOTING RIGHTS ACT TO ACHIEVE A SECTION 2 REMEDY WHERE THERE IS AN ABSENCE OF EVIDENCE THAT THE VOTING PRACTICE AT ISSUE INTENTIONALLY DISCRIMINATES AGAINST MINORITY VOTERS.

The three judge panel's injunction effectively affords the United States the same relief it would have obtained had it been able to prove that the City's use of majority vote to elect the mayor violated Section 2 of the Voting Rights Act. Since the City is enjoined from using majority vote for mayoral elections and the Department of Justice is unwilling to preclear majority vote for the mayor, the City will have no choice but to elect the mayor

by plurality vote. This is tantamount to a Section 2 victory for the Department of Justice without any findings that the City's use of majority vote to elect the mayor is discriminatory. Under *Miller v. Johnson*, 115 S.Ct. 2475 (1995), and its recent progeny, the Attorney General cannot abuse its Section 5 authority to impose a Section 2 remedy. That is precisely what the Attorney General has done in this case. The Attorney General manufactured a Section 5 lawsuit in this case eighteen years after a prior Department administration finally resolved the issue in the City's favor. All the City requests is that under the unique facts of this case, the Section 5 injunction be lifted leaving the government the opportunity to challenge majority vote under Section 2 for the mayor if it believes that is appropriate.

IV. THE THREE JUDGE PANEL ERRED IN HOLDING THAT THE ATTORNEY GENERAL'S PRECLEARANCE OF THE 1968 MUNICIPAL ELECTIONS CODE WHICH REQUIRED THE CITY TO USE MAJORITY VOTE DID NOT ALSO PRECLEAR THE CITY'S USE OF MAJORITY VOTE.

The three judge panel held that this Court's footnote analysis in *City of Rome v. United States*, 446 U.S. 156 (1980), was dispositive of the City's arguments that preclearance of the 1968 Georgia Municipal Elections Code and its majority vote requirement logically constituted preclearance for the City's use of majority vote pursuant to the Code. (App. A, p. 19a). The City argued that this Court's footnote analysis was not central to the issues presented in *City of Rome* and that the present case presented a better and more direct opportunity to appropriately analyze the effect of the Attorney General's preclearance of the 1968 Code.

As set forth in the three judge panel's Opinion, the parties in this case developed a thorough record regarding the 1968 Municipal Elections Code and directly litigated that issue as a primary issue in this lawsuit. The language

of the 1968 Code as it relates to majority vote is clear. Where a city's charter is silent on the question of majority or plurality vote, majority vote is mandatory. (App. F, pp. 47a-52a). To read the Municipal Elections Code in any other manner would render a valid and precleared state elections law a complete nullity. (App. F, pp. 47a-52a). This view was the originating judge's analysis in the *Howard* litigation in 1976. (App. F, pp. 47a-52a). The record in this case suggests that the Department of Justice agreed with the analysis of the originating judge in *Howard* when the Department conducted its own independent review of that decision in 1976.

This case affords this Court an opportunity to throughly address the impact of the Attorney General's preclearance of the 1968 Municipal Elections Code as it relates to the majority vote requirement and clear any confusion that may be created by the three judge panel's reliance on this Court's footnote analysis in *City of Rome*.

CONCLUSION

For the foregoing reasons, appellants respectfully submit that the questions it presents are substantial, and they request that this Court docket this appeal for full briefing and argument.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed April 15, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

3:94-cv-45 (WDO)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CITY OF MONROE, GA., *et al.*,
Defendants.

Before ANDERSON, Circuit Judge, FITZPATRICK, Chief Judge, and OWENS, District Judge.

MEMORANDUM OPINION

In the instant case, the United States seeks an injunction barring the City of Monroe from using a majority-vote requirement in its mayoral elections until this requirement receives federal approval according to Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c. For the reasons set out below, we conclude that the United States is entitled to relief.

Before we address the precise arguments advanced by the parties, we briefly summarize the scope of our jurisdiction in a § 5 suit and set out the historical facts regarding the City of Monroe's majority-vote requirement and the procedural posture of the case today.

I. THE SCOPE OF OUR § 5 INQUIRY

Section 5 of the Voting Rights Act of 1965 requires covered jurisdictions to gain federal approval before enforcing any "voting qualifications or prerequisite to voting,

or standard, practice, or procedure with the respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Federal approval, known as "preclearance," may be gained by obtaining a declaratory judgment from the District Court for the District of Columbia to the effect that the change involved "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Id.* Alternatively, a jurisdiction may elect to seek preclearance from the United States Attorney General: if the Attorney General has not interposed an objection within sixty days after the jurisdiction submits the change or if the Attorney General has affirmatively indicated that no objection will be made, then the State may enforce the change. Pending either form of preclearance, "[s]tatutory provisions constituting changes in election practices are not 'effective as laws. . . .'" *McCain v. Lybrand*, 104 S.Ct. 1037, 1043 (1984) (quoting *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975) (per curiam)).

It is well-established that either the Attorney General or a private plaintiff may bring an action in the district courts to enforce the preclearance mandate of § 5. *Allen v. State Board of Elections*, 89 S.Ct. 817, 826-27 (1969); 42 U.S.C. § 1973j(d). According to the express terms of the Act, any such action must be heard by a three-judge panel in accordance with the provisions of 28 U.S.C. § 2284. 42 U.S.C. § 1973c. When presented with a § 5 suit, a three-judge panel such as the one convened here today may determine only "(I) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate." *City of Lockhart v. United States*, 103 S.Ct. 998, 1001 n.3 (1983). What we may *not* decide is "what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the

determination whether a covered change does or does not have the purpose or effect 'of denying or abridging the rights to vote on account of race or color.'" *Perkins v. Matthews*, 91 S.Ct. 431, 435 (1971).

II. FACTS AND PROCEDURAL POSTURE

A. *Historical Facts Regarding the City's Election Practices*[1]

The City of Monroe is a municipal corporation created by legislative act of the General Assembly of Georgia; the City derives all of its powers from this and from subsequent legislative acts. Prior to November 1, 1964 (the baseline date from which § 5 changes are measured), the City of Monroe's charter did not specify whether election of the mayor and city council would be by majority vote or by a plurality. However, the parties agree that prior to November 1, 1964, the City used a plurality-vote requirement to decide races in which more than two candidates ran for office.

In 1966, the General Assembly amended the City's charter to require that the election of the mayor and the members of the city council be determined by majority vote. 1966 Ga. Laws 2457, 2459. Although the amendment was neither submitted to the Attorney General nor was a declaratory judgment brought before the District Court for the District of Columbia, the City proceeded to conduct elections under the majority rule imposed by the new charter.

In 1968, the General Assembly enacted a comprehensive Municipal Election Code applicable to all Georgia municipalities including the City of Monroe. (We refer to this statute as "the 1968 Statewide Code.") Section 34A-1407 of the Code reads in relevant part:

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[1] We find the parties in agreement as to the facts material to this litigation.

> Municipal Charter to govern vote required for nomination; runoff primary or election—(a) If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this Subsection, provides that a candiate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.

By letter dated May 13, 1968, the State of Georgia submitted the Statewide Code to the Attorney General for § 5 preclearance. The State of Georgia's application noted:

> Heretofore, the laws governing municipal elections have been contained in the charters of the more than 400 incorporated towns and cities in Georgia. These charter provisions as to elections have been amended from time to time. . . . As a consequence, there have been as many or more variations in the municipal election laws in Georgia as there are municipalities.
>
> . . .
>
> At the 1968 Session of the Georgia Assembly of Georgia, there was enacted the "Georgia Municipal Election Code," . . . which codifies and makes uniform . . . throughout the State (with certain options hereinafter noted) municipal election laws.
>
> . . .
>
> In view of the variety of laws which heretofore existed, no effort will be made herein to set forth the prior laws superseded by the Municipal Election Code. In view of its comprehensive nature, the Municipal Election Code when read in sequene is

> comprehensible, and therefore only its more significant features will be discussed herein.

The State then provided a list of the major areas in which this Code differed from the general election code governing nonmunicipal elections. In this list, the State referred to § 34A-1407 as follows:

> Whether the majority or plurality rule is in effect in the municipal election will depend upon how the municipality's charter is written at present or may be written in [the] future (i.e., charter may provide that the top 3 or top 5, etc., be elected as city commisisoners).

On July 11, 1968, the Attorney General responded to the State's submission, objecting to certain provisions of the 1968 Statewide Code. No objection was interposed regarding § 34A-1407(a).

Three years later, in 1971, the General Assembly enacted a comprehensive revision of the City of Monroe's charter. Section 2.03 of the 1971 charter reads in pertinent part:

> The candidate for mayor who receives a majority of votes cast in said election and the two candidates for councilmen who receive a majority of votes cast in their respective elections shall be elected for terms of office of two years each and until their successors are duly elected and qualified.

1971 Ga. Laws 3221, 3227. Like the 1966 charter revision, Section 2.03 was neither submitted to the Attorney General nor made the basis of a declaratory judgment action before the District Court for the District of Columbia.

In 1976, two black citizens of Monroe brought § 5 suit against the City, alleging that neither the majority-vote provision of the 1966 Charter nor the majority vote provision of the 1971 Charter had been precleared accord-

ing to the mandates of the Act. In addition, the plaintiffs complained that three annexation ordinances had not been properly precleared. On July 29, 1976, a three-judge panel agreed with the plaintiffs, holding that "[t]he enactment of a majority vote requirement is subject to section five, and those laws cannot therefore be further utilized until its procedures have been followed." *Howard v. Board of Commissioners of Walton County*, No. 75-67-ATH, slip op. at 3 (M.D. Ga. July 29, 1976). Accordingly, the three-judge panel enjoined enforcement of "[t]hose parts of [the 1966 and 1971 Charters] which provide for election of the mayor and councilmen of the City of Monroe by majority vote. . . ." *Id.* at 5. The panel similiarly held that the annexations had not been precleared as required and, therefore, that defendants were enjoined from enforcing the ordinances effecting the annexations.

In its order, the three-judge panel noted that the City claimed that even if enforcement of the 1966 and 1971 charter provisions was enjoined, the 1968 Statewide Code mandated majority-vote elections in all cities except those whose charter provided otherwise. "This general statute was enacted in 1968, [1968 Ga.Laws 885]," noted the panel, "and according to the parties has been approved by the Attorney General pursuant to section five."[2] *Id.* at 4. The panel wrote, "The application of this general law in this instance and the resolution of this issue does not require a three-judge court." *Id.* Accordingly, the case was remanded to the originating judge for further proceedings consistent with the panel's opinion.

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[2] When the parties made this representation to the court, they did not have the benefit of the Supreme Court decision in *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548 (1980), which was not decided until almost four years later. In *City of Rome*, the Court held that the preclearance of the 1968 Statewide Code did not preclear the majority-vote provision in the several municipalities. *See* discussion in Part V.A. *infra*.

On July 29, 1976, the originating judge issued an order responding to the panel's request. With respect to the City of Monroe, the judge wrote:

> The issue concerning the city is whether a majority or plurality vote is required for the election of mayor and councilmen.
>
> The 1971 city charter, [1971] Ga. Laws 3221, 3227, and an amendment to the predecessor charter, [1966] Ga. Laws 2458, provided for the election of the mayor and council by a majority vote. Both of these statutes having been declared unenforceable under section five, the remaining city charter is silent as to whether a plurality or majority vote is required. The parties agree that the city conducted plurality elections until enactment of [1966] Ga. Laws 2458.
>
> Georgia's Municipal Election Code, Ga. Code Ann. § 34A-1407(a), provides:
>
> > If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.
>
> Since neither the charter nor an ordinance of the City of Monroe now or ever has provided for a plurality election, this general law, which the parties have informed the court was approved by the Attorney General of the United States as required by section five, clearly applies here and requires election by majority vote. Plaintiffs' argument that the Monroe city charter

must have provided for election by plurality vote because the city conducted elections on a plurality basis prior to the 1966 law is not persuasive. Such an interpretation would make a nullity of this general statute and void its obvious purpose of establishing an unambiguous rule for municipalities with charters lacking an express requirement.

Howard v. Board of Commissioners of Walton County, No. 75-67-ATH, op. at 3-4 (M.D. Ga. July 29, 1976).

On August 12, 1976, two weeks after the three-judge panel issued its order, the City submitted to the Attorney General the three annexations that the *Howard* court determined required preclearance. Attached to the submission were copies of the three-judge court's decision and the originating judge's order. Four days later, on August 16, the Attorney General received a letter from David Walbert, counsel for the *Howard* plaintiffs. In his letter, Walbert focused on the *Howard* court's resolution of the issue regarding the City's majority-vote requirement: he described the court's rejection of his argument that despite preclearance of the 1968 Act, individual municipalities were required to have § 5 approval before implementing the majority vote. Walbert wrote:

> We are presently debating an appeal based on the same issues we briefly outlined in the trial court. . . .
>
> My question to you is whether the Department of Justice would have an interest in this case. If the Department, as the enforcer of Section V, agreed with our positions and would see fit to intervene in the case, our chances would be vastly improved in my opinion. . . .

Walbert's letter indicates that he also submitted a copy of an order from the *Howard* litigation.

During discovery in this case, the Attorney General produced its internal records with regard to the inter-

vention request from Mr. Walbert and the request from the City for preclearance of its annexations. The records reveal that the internal discussions within the Attorney General's office during the fall of 1976 and 1977 focused on two matters. First, we find some discussions regarding whether the City's majority-vote requirement had already been precleared. This discussion related to whether or not the Attorney General's previous preclearance of the 1968 Statewide Code precleared the majority-vote requirement in the City of Monroe. Second, we find deliberations concerning whether the annexations proposed by the City would have a discriminatory purpose or effect. To answer this question, the Attorney General of course took into account the election practices of the City, and thus the annexation deliberations include frequent references to the City's majority-vote requirement.

As for the annexation deliberations, the record reveals the following events. By letter dated October 13, 1976, the Attorney General interposed an objection to two of the three annexations proposed by the City of Monroe. On October 18, 1976, the City's attorney requested that the City be allowed to submit further evidence and that the Attorney General reconsider its objection; the City also requested a conference with representatives of the Attorney General. On May 26, 1977, the conference requested by the City Attorney was held in the Monroe. Because the meeting was not formally documented, the record does not disclose precisely what transpired at the conference. The record does reveal that the conference was attended by representatives of the Attorney General, the City of Monroe, and of the black community; similarly, it is clear that the parties discussed the history of black political participation in Monroe and Walton County. The City's request for reconsideration was considered complete on September 29, 1977, and by letter dated November 25, 1977, the Attorney General withdrew its objection to the two annexations, stating that "[a] review of this entire record reveals

that the dilution of the black population caused by these annexations was approximately one half percent and that this small degree of dilution, in the demographic and electoral context of the City of Monroe, will have no discernible racially discriminatory electoral effect."

As for the preclearance status of the majority-vote requirement, the record shows the following events. Sometime during October and November of 1976, approximately the same time as the initial denial of annexation preclearance and the request for reconsideration, David Hunter (an attorney in the Voting Rights section) prepared a memo directed to the Assistant Attorney General recommending that a letter be sent to the City of Monroe requesting that they submit their majority-vote requirement for preclearance. The memo, which was accompanied by a proposed draft for such a "please submit" letter, also recommended that the Attorney General "if necessary, participate, in *Howard v. Board of Commissioners of Walton County* (as amicus or intervenors) or bring our own suit to assure compliance with Section 5." The record reveals no further deliberation on whether to follow Hunter's recommendations; the paper trial ends abrupty with a proposed "please submit" letter across the top of which is the handwritten notation "Not sent." Because the notation is not accompanied by a date, it is impossible for us to ascertain where in the chronology of events the decision not to send the letter was made.[3] We know only that there was discussion as to whether the previous preclearance of the 1968 Statewide Code precleared the City's majority-vote requirement and that the Attorney General did not implement the Hunter recommendation—i.e., the City of Monroe was not advised that it should submit its majority-vote requirement for preclearance.

[3] A routing and transmittal slip dated January 5, 1977, suggests that the "please submit" letter was still being circulated through the Voting Rights section at that time. We find no further hints as to the timing of or rationale for the decision not to send the letter.

In 1990, thirteen years after the *Howard* litigation began, the Georgia General Assembly again enacted an amendment to Monroe's charter. The preamble to the Act describes the purposes of the amendment as follows: "to change the date of municipal elections; to provide for election of the mayor and councilmembers; to provide for terms; to repeal conflicting laws; and for other purposes." 1990 Ga. Laws 4163. Section 1 of the 1990 Act carries forward the majority-vote requirement found in the City's previous charters. 1990 Ga. Laws 4163, 4163-4165.

On September 26, 1990, the city attorney sent a copy of the 1990 Act to the Attorney General for Section 5 preclearance. The letter accompanying the submission singled out various changes effected by the legislation regarding the date of elections, the length of terms, and the staggering of councilmembers' terms; the letter made no specific reference to the majority-vote provision. In reviewing this submission, the Attorney General's attention again turned to the majority-vote requirement and its tortuous history.[4] The Attorney General requested copies of the 1966 and 1971 charters, which the City submitted in accordance with the request. On July 3, 1991, the Assistant Attorney General informed the City that the Attorney General objected to the change from plurality voting to majority voting. Although the City twice requested reconsideration, the Attorney General refused to withdraw the objection. On June 3, 1994, the United States filed the instant suit against the City of Monroe, its mayor, councilmembers, and city clerk (collectively described as "the City"), alleging *inter alia* that the enforcement of the majority-vote requirement in the City's mayoral elections violates § 5.[5]

[4] The 1990 submission and the ensuing correspondence is like the 1976 documentation, voluminous and complicated. Because none of the issues implicated in this case turns on the precise details of the events occurring between 1990-1993, we do not dwell on these details.

[5] The complaint originally filed by the United States includes additional claims not before us today. In addition to the § 5 claim

B. *Procedural Posture of the Instant Case*

The United States and the City of Monroe have each filed a motion for summary judgment on the § 5 claim regarding the majority-vote requirement for the City's mayoral elections. On August 9, 1996, the panel heard oral argument on the parties' summary judgment motions. Because it is clear that the parties do not dispute the facts material to this litigation, but only the legal significance of those facts, summary judgment is appropriate at this time.

III. PRECLUSIVE EFFECTS OF THE *HOWARD* LITIGATION

Before we proceed to address the questions we are directed to answer in a § 5 case—i.e., whether § 5 covers the contested change, whether that change has been precleared, and if not, what remedy is appropriate—we must address the City's argument that the United States's suit is barred by the preclusive effects of the decision in *Howard v. Board of Commissioners*. After reviewing the case law, we conclude that there is an insufficient identity of parties to invoke issue or claim preclusion. *See Montana v. United States*, 99 S.Ct. 970, 973 (1979) ("A fundamental precept of commonlaw adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that 'a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit *between the same parties or their privies* . . . .'") (emphasis added).

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regarding the mayoral elections, Count I alleged that the use of majority vote in the city-council elections violated § 5. Count II alleged that the City's majority-vote requirement and at-large election of its councilmembers violated § 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments. During the course of this litigation, the United States and the City of Monroe reached an agreement regarding the method of electing city councilmembers.

On these facts, the Attorney General cannot be barred from relitigating the claims and issues brought by the private plaintiffs in *Howard*.[6]

The City of Monroe has expended considerable time arguing that in *this* case the Attorney General was not a formal party to the litigation. We address each of the Citys' arguments in turn. First, the City argues that in the instant case the Attorney General should be bound because of an identity of interests between the Attorney General and the private plaintiffs in *Howard*.[7] The City argues:

> Obviously, in the present case, the United States purports to represent the same interests and individuals as did the plaintiffs in *Howard*. Indeed, the United States has its authority to bring suit only in a representative capacity on behalf of its alleged aggrieved citizens. Moreover, in the *Howard* litigation, the plaintiffs sought to make the suit a class action suit thereby demonstrating their intent to sue in a representative capacity for all alleged aggrieved persons. In this case, since the United States purports to represent all of the same individuals who were plaintiffs in the *Howard* suit (and all similarly situated persons), they are deemed to be privies for the purpose of a preclusion analysis and are therefore bound by the *Howard* decision.

This argument is foreclosed by *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979), a decision binding on this court.

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[6] Because we find an insufficient identity of parties, we make no effort to identify rigorously the claim at issue in *Howard* or the scope of issues actually litigated and decided therein. Similarly, we do not address additional arguments offered by the United States as grounds for finding no preclusion.

[7] A non-party may be subject to the preclusive effects of a prior judgment "in certain limited circumstances [in which the non-party] . . . has his interests adequately represented by someone with the same interests who is a party." *Martin v. Wilks*, 109 S. Ct. 2180, 2184 (1989).

In *East Baton Rouge*, the Court of Appeals rejected a district court's conclusion that a suit brought by the Attorney General under the Voting Rights Act was precluded by earlier litigation conducted by private plaintiffs. The court wrote:

> [The district court's conclusion is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. *See, e.g., City of Richmond v. United States,* 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975). . . . This principle is based primarily on the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees." *United States v. Raines,* 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.
>
> Second, even assuming that the United States has no independent interest, the prior suit would not bar the present action. In *United States v. Texas,* 430 F. Supp. 920 (S.D. Tex. 1977), a three-judge district court . . . found res judicata inapplicable because the prior private suits were not certified as class actions, and, therefore, the United States could represent the interests of members of the putative class who were not named plaintiffs in the previous suits. 430 F. Supp. at 926. Similarly, in the present case, although the private suit was brought as a class action, the trial judge did not certify a class prior to the dismissal. Res judicata, therefore, could not properly apply to members of the putative class, or derivatively, to the United States.

594 F.2d at 58-59. The reasoning of the court in *East Baton Rouge* squarely rejects the precise arguments made by the City of Monroe today.

In support of its holding, the Fifth Circuit in *East Baton Rouge* relied upon the Supreme Court's decision in *City of Richmond v. United States,* 95 S.Ct. 2296 (1975). In *City of Richmond,* a voting-rights case, the Supreme Court rejected an argument that "estoppel effect" should be given to the judgment in a previous private-plaintiff suit involving the same annexation in question in *City of Richmond.* The Court wrote, "[W]e find controlling the nonparticipation of the United States and the Attorney General in [the earlier litigation]."[8] *Id.* at 2305 n.6. *Accord Hathorn v. Lovorn,* 102 S.Ct. 2421, 2430 n.23 (1982) ("The Attorney General is not bound by the resolution of § 5 issues in cases to which he was not party.") (citing *City of Richmond*).

Next, the City argues that the Attorney General, though a nonparty, may be bound by a prior judgment because "there is an identity of issues and the nonparty knew of the first action yet failed to intervene to assert its claims." Clearly, the Attorney General in the instant case was

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[8] As is suggested by the *East Baton Rouge* panel's reliance on *City of Richmond,* we strongly suspect that the Supreme Court's brief statement in that case is infused with the principles set out in more detail in *East Baton Rouge.* Since *City of Richmond,* the Supreme Court has expressly relied on the federal government's unique position to support the holding that the United States may not be collaterally estopped on an issue adjudicated against it an earlier lawsuit brought by a different party. *United States v. Mendoza,* 104 S. Ct. 568, 572 (1984) ("We have long recognized that 'the Government is not in a position identical to that of a private litigant,' . . . both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates.") (quoting *INS v. Hibi,* 414 U.S. 5, 8, 94 S. Ct. 19, 21 (1973) (per curiam)).

aware of the *Howard* litigation and did not intervene. However, the Supreme Court has rejected the claim that a conscious decision not to intervene justifies subjecting a nonparty to the preclusive effects of a prior judgment. In *Martin v. Wilks*, 109 S.Ct. 2180 (1989), the Supreme Court concluded that a discrimination suit brought by black firefighters and resolved by consent decree could not bar white firefighters' subsequent reverse discrimination suit even though the white firefighters were aware that the black firefighters' suit could affect their interests and did not move to intervene. The Court first quoted from an earlier decision: "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* at 2185 (quoting *Chase National Bank v. Norwalk*, 291 U.S. 431, 54 S.Ct. 475 (1934)). The Court then addressed the way in which the Federal Rules of Civil Procedure incorporate the principle of *Chase National*, opting for a system of mandatory joinder rather than mandatory intervention. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Id.* at 2186. We conclude that the Court's rationale indicates rejection of the City's argument.[9]

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[9] In fact, we think that where the government is the party against whom a preclusion-by-nonintervention argument is lodged, there are additional concerns mandating rejection of this argument. If the rule were indeed as the City argues, private litigants suing to enforce constitutional or statutory guarantees could force the United States to either intervene or be bound by the decision simply by giving the government notice of its interest in the pending suit. We do not believe the rules of preclusion impose such an onerous burden on the government.

Finally, the City cites *Montana v. United States*, 99 S.Ct. 970 (1979), in support of its argument that the United States is bound by the preclusive effects of *Howard*. We readily conclude that *Montana v. United States* is distinguishable from the case before us today. In *Montana*, a contractor on a federal dam project brought suit in state court contending that the Montana gross receipts tax unconstitutionally discriminated against the United States and the companies with which it contracted. In a unanimous decision, the Montana Supreme Court sustained the tax. Subsequently, the United States brought suit in federal court, arguing that the tax unconstitutionally discriminated against the United States and its contractors. The Supreme Court concluded that the federal action was barred by collateral estoppel because the United States "exercised control" over the contractor's litigation in the state court. *Id.* at 974. The following facts supported the conclusion that the "United States plainly had a sufficient 'laboring oar' in the couduct of the state-court litigation to actuate principles of estoppel": the United States required that the contractor file the state-court lawsuit; reviewed and approved the complaint; paid the attorneys' fees and costs; directed the appeal from State District Court to the Montana Supreme Court; appeared and submitted a brief as amicus in the Montana Supreme Court; directed the filing of a notice of appeal to the Supreme Court of the United States; and effectuated the contractor's abandonment of that appeal. *Id.* In the instant case, the City of Monroe has not even alleged that the United States exercised control over the *Howard* plaintiffs' litigation; in fact, what they have alleged is that the United States *refused* to take a role in the *Howard* litigation. *Montana v. United States* is therefore clearly inapposite. *See East Baton Rouge*, 594 F.2d at 58 (distinguishing *Montana* on similar grounds).

Because we cannot agree that the United States is precluded from relitigating the claims or issues before the

Howard court, we turn to the first question of our § 5 inquiry.

IV. DOES § 5 COVER THE CONTESTED CHANGE?

We address this first question *pro forma*. The City has never disputed that the shift from the pre-November 1, 1964 plurality-voting scheme to a majority-vote requirement is a change covered by § 5. Indeed, a majority-vote requirement is a clear example of a "standard, practice, or procedure with respect to voting" within the purview of § 5. *See City of Rome v. United States,* 100 S.Ct. 1548, 1553 (1980). What the City does dispute is whether this change has been precleared; this brings us to the second question of our § 5 inquiry.

V. HAS THE CHANGE BEEN PRECLEARED IN ACCORDANCE WITH § 5

The City argues that at least one of two events precleared the majority-vote requirement. We examine each of these events in turn. First, we consider the argument that the Attorney General's failure to object to § 34A-1407(a) of the 1968 Statewide Code effected a preclearance of the City's majority-vote requirement. Second, we consider the argument that a preclearance occurred because of the Attorney General's conduct during the events surrounding the *Howard* litigation and the City's annexation submission.

A. *The Lack of Objection to the 1968 Statewide Code*

In its motion for summary judgment, the City argues that "the 1968 submission and the Attorney General's response to it mandate a finding of preclearance." The City notes that its submission did call to the attention of the Attorney General both the majority vote provision and the fact that the City was not including information with respect to the several affected municipalities. The City argues that notwithstanding the foregoing, the Attorney General interposed no objection and requested no additional information in order to determine the impact on specific municipalities. As the City states its argument:

> [T]he Department of Justice's acceptance of the majority vote requirement as submitted, in light of the express qualifications as to the nature of the information submitted is strong evidence of the fact that the Department of Justice adopted and pre-cleared as a *matter of policy* the prevailing majority vote requirement and the imminent changes from plurality to majority vote which would be mandated.

(Emphasis in original).

In response, the United States notes that the City's submission expressly stated that the effect of the majority-vote provision "will depend upon how the municipality's charter is written at present or may be written in [the] future," thus suggesting that the preclearance issue would be presented city by city. The United States argues that the lack of objection to § 34A-1407(a) only precleared the decision to defer to local charters as to whether election would be by majority or plurality; in its view, the lack of objection did not preclear changes in individual municipaities.

We need not delve deeply into the general principles that would govern our resolution of this issue because the Supreme Court, in a case involving another of Georgia's municipalities, has rejected the precise argument made by the City of Monroe. In *City of Rome v. United States,* 100 S. Ct. 1548 (1980), the Supreme Court addressed "the constitutionality of the Voting Rights Act of 1965 and its applicability to electoral changes and annexations made by the city of Rome, Ga." *Id.* at 1552. Like the City of Monroe, Rome elected its officials by plurality vote as of November 1, 1964; [10] like the City of Monroe, Rome

[10] Unlike the City of Monroe, Rome's plurality-vote requirement was articulated in its pre-November 1, 1964 charter. However, this factual difference is not relevant to the application of the *City of Rome* rationale to this case.

had an unprecleared 1966 charter enacting a majority-vote requirement; and like the City of Monroe, Rome argued that despite the lack of preclearance for the 1966 charter, the City's majority-vote provision had been precleared by the Attorney General's response to the submission of the 1968 Code. The Court responded to this argument as follows:

> We also reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR § 51.10 (1979), and the decisions of this Court require that the jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." *Allen v. State Board of Elections*, 393 U.S. 544, 571, 89 S. Ct. 817, 834-835, 22 L.Ed.2d 1 (1969), and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction, see *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 137-138, 98 S. Ct. 965, 982-983, 55 L.Ed.2d 148 (1978). Under this standard, the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District Court noted, the State's submission informed the Attorney General only to "its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts," and "did not . . . submit in an "unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues." 472 F. Supp. 221, 233 (D.C. 1979).

Id. at 1557 n.6. The Court's rejection of Rome's argument dictates that we reject the argument Monroe makes today.

The City makes several attempts to avoid our application of *City of Rome* to the instant case. First, the City argues that the language quoted above is "mere dicta." We reject this characterization out of hand. The Supreme Court addressed an argument presented by the City that, if accepted, would have mandated reversal of the lower court's judgment (at least as to the claims to which the argument related); the Court expressly rejected that argument and proceeded to affirm the judgment of the district court. Contrary to the City of Monroe's assertions, the mere fact that the Court addressed this claim in a footnote does not affect its precedential nature.

Second, the City of Monroe argues that the Court's discussion in *City of Rome*, even if not dicta, is not dispositive of the instant case. The gist of the City's argument appears to be this: in the *City of Rome* case, the argument was that preclearance of the 1968 Act somehow "breathed life" into the unprecleared 1966 charter; by contrast, the City's argument here is that the preclearance of the 1968 Act precleared the use of majority vote in all cities, including Monroe, whose *valid* charter was silent as to whether majority or plurality voting was the rule.[11] We cannot agree that this distinction renders the Supreme Court's disposition of the argument before it inapposite to the argument before us today. The Court's rationale focused squarely on the notion that the State's submission of the 1968 Statewide Code did not put before the Attorney General the propriety of changes in the voting practices of individual cities:

> [A]s the district court noted, the State's submission informed the Attorney General only of "its decision

[11] The City's argument turns on its concession that the 1966 charter, which expressly provided for majority vote, was invalid due to the lack of preclearance. Thus, the City's *valid* charter was the earlier charter, which was silent as to the question of majority or plurality vote.

> to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts," and "did not . . . submit in an 'unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues."

We think this rationale forecloses the City of Monroe's argument.

B. *The Effect of the Events Surrounding the Howard Litigation and the City's Annexation Submission*

The City also argues that it cannot be required to submit its majority-vote requirement for preclearance because the "1976 *Howard*-related [documentation] makes clear that the Department of Justice evaluated the City's use of majority vote in the § 5 process and that it passed muster under § 5." The gist of the City's argument seems to be that, although the majority-vote provision was never submitted to the Attorney General, and although the Attorney General never formally or expressly precleared it, the Attorney General should be deemed to have precleared the majority-vote requirement because the Attorney General actually considered and approved the change. After reviewing the record in light of the Supreme Court's preclearance jurisprudence, we must reject this "informal preclearance" argument.

The Supreme Court's decision in *McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037 (1984), forecloses the argument made by the City. Although the Court seems to have assumed the possibility that preclearance might be effected informally under some circumstances,[12] the Court clearly contemplated that there could be no such preclearance short of proof that the Attorney General had actually considered and approved the merits of the change in question—i.e., determined that the change did not have a discriminatory purpose or effect. In *McCain*, the Court

[12] *See infra* note 17.

addressed a three-judge panel's conclusion that changes enacted by a 1966 statute and preserved in a 1971 amendment of the statute were precleared by the Attorney General's failure to object to a submission regarding the 1971 Act. To support its holding, the district court relied on alternative grounds, one of which was that "[the Attorney General] had considered all aspects of the electoral scheme, including the changes effected in the 1966 Act." *Id.* at 1047. At the crux of the Supreme Court's rejection of this approach was the Court's conclusion that the record did not show that the Attorney General had in fact considered and approved the 1966 changes. In other words, the record did not show that the Attorney General had conducted the appropriate evaluation of the 1966 changes, as compared to the preexisting electoral system, and concluded that the 1966 changes had neither a discriminatory purpose nor a discriminatory effect. *Id.* at 1047-49.

The record in the instant case, like the record in *MeCain*, does not support an assertion that the Attorney General actually considered and approved the change made by the shift to majority voting. As the above recitation of facts shows, the Attorney General's Office had two types of documents before it in 1976 and 1977 regarding the City of Monroe: first, the *Howard* plaintiffs' request or bring a separate § 5 challenge; and second, a submission from the City of Monroe requesting preclearance of three annexations. The documents reveal that the Attorney General was aware of the following facts: that the City's elections were being conducted on the basis of a majority vote; that there was private litigation regarding whether the City's majority vote had been properly precleared; and that there was some question as to whether the failure to object to the 1968 statewide Code precleared majority voting in Monroe. The documents also suggest that, in the course of considering whether or not the submitted annexations had a discriminatory purpose or effect, the Attorney General took into account the fact that the City was using majority voting. However, nothing in either set

of correspondence shows that the Attorney General made the difficult and complex decision that the shift from plurality to majority voting was not discriminatory in purpose or effect. The discusison within the Attorney General's Office about whether the 1968 Statewide Code precleared majority voting in Monroe does not constitute the "on the merits" evaluation contemplated in *McCain* (i.e., the evaluation of whether the change from plurality to majority voting has a discriminatory purpose or effect). The same is true with respect to the evaluation of the annexations. While that evaluation was conducted on the basis of the then-current electoral practices, including majority voting, the analysis conducted by the Attorney General to determine whether the annexations had a discriminatory purpose or effect is very different from an analysis comparing plurality versus majority voting.[13]

In addition to the informal preclearance argument addressed above, the City also seems to argue that the Attorney General was aware of an arguably unprecleared change, took no action, and therefore should be deemed to have precleared the change.[14] To address this argument

[13] As for comparison of the substantive effects of plurality versus majority voting, we find in the record only an observation made by a research analyst (in the annexation analysis): "If it were not for the majority vote requirement [as opposed to a plurality], a black would have been elected to the City Council in 1970." This isolated comparison is not persuasive evidence that the Attorney General in fact addressed the difficult and complex issue of whether a shift from plurality to majority had a discriminatory purpose or effect. Moreover, this isolated comparison does not alter the fact that there is no evidence at all that the Attorney General actually concluded that the change was *devoid of* discriminatory purpose and effect.

[14] This argument is most evident in the City's attempt to distinguish *McCain* on the basis of the fact that the Attorney General in *McCain* either did not recognize that the 1966 Act required preclearance or assumed that it had been precleared. *McCain*, 104 S. Ct. at 1048 n.23. The City's argument that this factual difference requires a different result is tantamount to the preclearance by estoppel argument.

(which is essentially a "preclearance by estoppel" argument), we do not find it necessary to discuss broad questions regarding when equitable estoppel principles may be invoked against the government; the Supreme Court's preclearance jurisprudence itself forecloses the argument that the Attorney General's failure to request submission bars the recovery sought before this court.[15]

The Supreme Court has rejected the argument that a preclearance is effected by the Attorney General's subjective awareness of an unprecleared change and failure to interpose an objection to that change. In *Allen v. State Board of Elections*, 89 S.Ct. 817 (1969), the Supreme Court refused to hold that a change in voting practices had been precleared because the Attorney General received notice of the change through the briefs of the litigation at hand but submitted no objection. The Court wrote:

> A fair interpretation of the [Voting Rights] Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

[15] For an opinion rejecting a somewhat different "preclearance by estoppel" argument, see *Haith v. Martin*, 618 F. Supp. 410 (D.C.N.C. 1985), *aff'd*, 106 S. Ct. 3268 (1986) (mem.). In *Haith*, North Carolina officials argued that they should not be required to submit various changes regarding the election of judges because a letter from the Assistant Attorney General suggested (erroneously) that changes in the State's court system were not subject to section 5. In effect, the State argued that the representation should estop the United States from requiring the State to submit for preclearance changes enacted prior to the court's decision. The panel rejected that argument outright:

> [T]he Act does not give this court the power to provide equitable relief to defendants, no matter how just their cause. *See*, 42 U.S.C. § 1973c [§ 5 of the Voting Rights Act].

By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. *Id.* at 414.

Id. at 834-35. Similarly, in *United States v. Board of Commissioners of Sheffield,* 98 S.Ct. 965 (1978), the Supreme Court was presented with the argument that preclearance of a referendum to determine whether to switch to a mayor-alderman form of government constituted preclearance of the switch itself. The Court rejected this argument:

> While the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change, the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him.

Id. at 981.[16] Having concluded that no proper submission was made, the *Sheffield* Court concluded that "the Attorney General did not intend to approve the proposed change to a mayor-council government and could not be understood as having done so." *Id.* at 982.

As we understand it, the Court's decision in *McCain v. Lybrand* sets out the contours of whatever exception to the proper-submission rule may have been suggested by the language in *Sheffield* regarding whether a change was "in fact evaluated."[17] And *McCain,* as noted above,

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[16] For purposes of clarity, we note that the first clause of the quoted statement—"the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change"—refers to the explicit provision of § 5 that the Attorney General will be treated as having approved a voting change if the change has been properly submitted and no objection has been interposed by the Attorney General within sixty days after such submission. *Sheffield,* 98 S. Ct. at 981 (quoting 42 U.S.C. § 1973c).

[17] It may actually be that there are no exceptions to the "proper-submission" rule: neither in the parties' briefs nor in our own research do we find any case in which the Supreme Court has

focuses not on whether the Attorney General proceeded in an ideal manner, but on whether the record shows that the Attorney General actually undertook an evaluation of the practical effects of the change at issue and actually found neither the purpose nor the effect proscribed by the statute.

The "preclearance by estoppel" argument fails today (as it did in *Allen*) because it would conflict with the very policies that underlie the § 5 procedure and the Supreme Court's jurisprudence in this area. The Court has repeatedly described the history behind § 5 and the burden it imposes on covered jurisdictions. In *South Carolina v. Katzenbach,* 86 S.Ct. 803 (1966), the Court attributed the enactment of § 5 to the recalcitrance of many jurisdictions in the face of early voting rights litigation: "After enduring nearly a century of systematic resistance to the Fifteenth Amendment," the Court wrote, "Congress might well decide to shift the advantage of time and inertia from the perpetrators of evil to its victims." *Id.* at 818. More recently, the Court has focused specifically on the justifications for requiring formal submissions:

> Congress recognized that the Attorney General could not, in addition to these duties [to respond to proper submissions], also monitor and identify each voting change in each jurisdiction subject to § 5. "[B]ecause of the acknowledged and anticipated inability of the Justice Department—given limited resources—to in-

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found a preclearance in the absence of a proper submission. We do not reach this ultimate question because we need not decide so much to resolve the case before us today. Today, we need only decide that the City of Monroe has not shown the substantive evaluation of a change that would, as a factual matter, force us to answer the legal question of whether *Sheffield* and *McCain* truly create an exception to the proper-submission rule. *See* discussion above rejecting the City's "informal preclearance" argument because the City failed to show the requisite substantive evaluation of the change.

> vestigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," [*McCain,*] 465 U.S. at 247, 104 S.Ct. at 1044-45, Congress required each jurisdiction subject to § 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes.

Clark v. Roemer, 111 S.Ct. 2096, 2104 (1991) (rejecting the argument that preclearance of an amended statute necessarily effects a preclearance of all unprecleared changes incorporated in that statute).

The City's "preclearance by estoppel" argument is subject to the same flaw the Supreme Court found in *Clark*: it "upsets th[e proper] ordering of responsibilities under § 5 . . . ." *Id.* Such a rule would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether." *Id.* The rule the City encourages us to adopt would encourage jurisdictions aware of existing, unprecleared changes not to submit those changes for immediate preclearance, but instead to comb through the files of the Department of Justice looking for evidence that might lead to a "preclearance by estoppel."

Finally, we find no tenstion between rejection of the City's "preclearance by estoppel" argument and the Supreme Court's decision in *Morris v. Gressette,* 97 S.Ct. 2411 (1977). In *Morris,* the Court held that the Attorney General's faliure to interpose an objection within the statutory 60-day period is not subject to judicial review. Thus, as the City points out, a clerical error could bar the Department of Justice from interposing a § 5 objection to a change properly submitted for preclearance (if that error resulted in no objection being timely interposed). However, we cannot agree with the City that an anomaly would exist if the Attorney General could be barred by negligence in the former situation but not by the type of

knowing decision implicated in the present case (i.e., the decision not to send the letter requesting the City to submit the majority vote for preclearance). *Morris* deals with the specific statuatory provision that a covered jurisdiction may enforce a change that has been properly submitted if the Attorney General has not interposed an objection within sixty days (as counted under regulations promulgated by the Attorney General). The rule the City proposes would reach well beyond *Morris* and the statute to the very different proposition that the Attorney General could be barred by silence without regard to whether a proper submission has ever been made.

For the foregoing reasons, we conclude that the City's majority vote provision has never been precleared.

VI. THE QUESTION OF LACHES

Before addressing the appropriate remedy, we must address the City's claim that the United States is barred by laches from bringing the instant suit. After reviewing the case law, we are persuaded that the instant government suit cannot be barred by laches.

As other courts have noted, the case law regarding when laches may be invoked against the government is less precise than might be desired. Although there exists an often-quoted principle that "laches is not a defense against the sovereign," *Costello v. United States,* 81 S.Ct. 534, 543 (1961), the precise contours of the rule have been rendered somewhat unclear by various cases allowing laches to be invoked as a defense against the government. We find it unnecessary to attempt any grand synthesis of the exisitng case law in order to resolve the case before us today; the instant case is readly distinguishable from those cases in which courts have concluded that laches *is* appropriately invoked against the government.

One line of authority invoked to support the City's argument is a line of cases in which courts have allowed

defendants to raise a laches bar to suits brought by the Equal Employment Opportunity Commission. In *Occidental Life Insurance Co. v. EEOC*, 97 S.Ct. 2447 (1977), a case in which the EEOC brought suit against an employer over three years after the employee first complained to the Commission, the Supreme Court addressed the question of "what time limitation, if any, is imposed on the EEOC's power to bring [a Title VII] suit." *Id.* at 2450. Having rejected the employer's arguments that either federal law or State law created an inflexible time limit on the bringing of lawsuits, the Court wrote:

> It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief. . . . The same discretionary power "to locate 'a just result' in light of the circumstances peculiar to the case," . . . can also be exercised when the EEOC is the plaintiff.

Id. at 2458. In light of *Occidental Life*, lower courts, including the Eleventh Circuit, have relied on laches as grounds for dismissal of EEOC actions which have been inordinately delayed. *See EEOC v. Dresser Industries, Inc.*, 668 F.2d 1199, 1201-02 (11th cir. 1982) (citing similar holdings in other courts of appeal).[18] Here, the

[18] *Dresser Industries* expressly provides that the application of a laches bar to the EEOC suit before the court "by no means prevents the EEOC from filing a current charge, investigating it, and filing a new lawsuit if, as alleged, discriminatory practices are continuing." *Id.* at 1200 n.2. Because we conclude that laches cannot bar the instant suit because the government here sues to vindicate its sovereign rights, we need not address the argument that the lack of preclearance could be seen as a "continuing violation" and thus saved from a laches bar.

City invites us to draw an analogy between an EEOC suit to enforce federal anti-discrimination law and a Department of Justice suit to enforce the preclearance mandate of § 5. For the reasons set out below, we reject that invitation.

To illustrate the difference between the EEOC's position in a typical employment-discrimination suit and the Department of Justice's position in the preclearance suit before us today, a return to first principles is in order. As then-Justice Rehnquist pointed out in dissent in *Occidental Life*,[19] the Supreme Court long ago stated the scope of the laches inquiry as follows:

> The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. . . . But this case [a patent controversy] stands upon a different footing, and presents a different question. The question is, are these defenses available to the defendant in a case where the government, although a nominal complainant party, has no real interest in the litigation, but has allowed its name to be used therein for the sole benefit of a private person?

United States v. Beebe, 8 S.Ct. 1083, 1086 (1888) (quoted in *Occidental Life*, 97 S.Ct. at 2462 (Rehnquist, J., dissenting)). In the type of discrimination suits we have allowed to be barred by laches, the EEOC allows

[19] Justice Rehnquist argued that because an EEOC suit does not "seek[] to vindicate rights belonging to the United States as sovereign," such suits should be subject to State-law statutes of limitation.

its name to be used for the sole benefit of private persons. *See Dresser Industries*, 668 F.2d at 1204 (distinguishing from EEOC suits properly barred by laches any suit brought by the EEOC "to prohibit [the employer] from pursuing a pattern of discrimination that is allegedly occurring [at the time of suit]"); *see also Occidental Life*, 97 S.Ct. at 2458 (focusing specifically on the appropriateness of limiting backpay relief in cases involving an inordinate EEOC delay). Accordingly, in the cases appropriately barred by laches, the EEOC can be described as a "nominal complainant party."

By contrast, in suing to enforce the preclearance procedures of § 5, the United States has a real interest in the litigation and cannot be said to merely allow its name to be used for the "sole benefit of a private person." The statutory provisions assign to the federal government the function of determining whether covered changes have a proscribed purpose or effect before those changes are enforced. In discharging this statutory function, the government is charged with protecting a public interest of the highes significance—the right of all citizens to participate equally in the processes of democratic governance. *Cf. Yick Wo v. Hopkins*, 6 S.C. 1064, 1071 (1866) ("Though not regarded strictly as a nautral right, but as a privilege merely conceded by society . . . [the political franchise] is regarded as a fundamental political right, because preservative of all rights."). In a § 5 suit such as the one before us today, the government seeks to enforce its right to exercise this unique prerogative for the benefit of all of Monroe's citizens, present and future.[20] Because

[20] We readily conclude, and the City does not argue otherwise, that the unique nature of the preclearance function removes the instant case from the parameters of the Supreme Court's decision in *Clearfield Trust Co. v. United States*, 63 S.Ct. 573 (1943). In *Clearfield Trust*, the Court concluded that the United States was entitled to no special exemption from the rule that lack of prompt notice from a drawee of funds on learning of a forgery may bar the drawee's recovery. The Court wrote:

> The fact that the drawee is the United States and the laches those of its employees [is] not material. . . . The United States as drawee of commercial paper stands in no different light than any other drawee. . . . 'The United States does business on business terms.' It is not excepted from the general rules governing the rights and duties of drawees . . . .

Id. at 576. In exercising the preclearance function, the United States performs a uniquely governmental function; *Clearfield Trust* is thus inapposite.

the preclearance function is a paradigm example of the government's functioning in its sovereign capacity, we conclude that the instant case falls well within the core of cases in which the United States is immune from the doctrine of laches.

In support of its argument that laches can constitute a bar to the Attorney General's prevailing in a § 5 suit, the City brings to our attention the decision in *United States v. Georgia*, No. C76-1531A (N.D. Ga. Sept. 30, 1977) (unpublished), *aff'd*, 436 U.S. 941 (1978) (mem.). In *United States v. Georgia*, a three-judge panel rejected a § 5 challenge brought by the Department of Justice regarding two provisions of the Georgia Election Code of 1964. Although it based its holding on a conclusion that there had been an effective preclearance, the panel also wrote:

> Although arguments of waiver and estoppel have been abandoned by the State, the court is constrained to note that the Attorney General's delay of eleven years in bringing an action for declaratory and injunctive relief to force the State to submit the complained of provisions to a preclearance procedure is inexcusable and, if allowed, would have placed the electoral system of the state of Georgia in an uproar on the eve of a general election.

Several things about *United States v. Georgia* and its precedential effect deserve mention. First, a summary

affirmance by the Supreme Court "affirms only the judgment of the court below, and no more may be read into [the Court's] action than was essential to sustain that judgment." *Anderson v. Celebrezze,* 103 S.Ct. 1564, 1568 n.5 (1983). The three-judge panel in *United States v. Georgia* did not hold that laches barred the government's suit (as the State had abandoned this argument); instead, it ruled in favor of the State on other grounds. Because the laches rationale can hardly be said to have been "essential to sustain the judgment," we cannot infer Supreme Court approval of the lower court's statements regarding the Attorney General's delay. As for the persuasiveness of the decision of the panel itself, we note that the opinion offers no discussion at all regarding how the case before it might be distinguished from the principles discussed above exempting sovereign governmental functions from the operation of laches.

Finally, we note that in *Brooks v. State Board of Elections,* 775 F. Supp. 1470 (S.D. Ga. 1989), *aff'd,* 111 S.Ct. 288 (1990) (mem.), a three-judge panel rejected an equitable argument somewhat similar to the one before us today. In *Brooks,* the panel rejected an argument that the laps of time between the enactment of the change and the § 5 challenge to the change justified some kind of "equitable preclearance." This is somewhat different from Monroe's argument, which relies on the lapse of time following notice to the Attorney General of an unprecleared change; however, the reasoning of the *Brooks* panel is similar to the rationale that underlies our conclusion today. The panel wrote:

> We are mindful of the time that has elapsed since some of the changes were enacted. We cannot, however, "equitably preclear" any of the changes based on equity's rule of laches. *See McCain,* 465 U.S. at 249-52, 104 S.Ct. at 1046-47; *cf. Haith v. Martin,* 618 F.Supp. 410 (estoppel). Recognizing that the Attorney General could not keep track of changes relating to voting being made, Congress put the burden on the covered jurisdictions to seek preclearance to avoid the very problem we now face. We would do violence to the heart of section 5 if we were to excuse the State's failure to seek preclearance merely because the State has been disregarding section 5 for a long time. Moreover, Supreme Court precedent in this area is unambiguous. *Allen v. State Board of Elections,* 393 U.S. 544, 571, 89 S.Ct. 817, 834; *United States v. Sheffield Board of Commissioners,* 435 U.S. at 136, 98 S.Ct. at 981; *McCain v. Lybrand,* 465 U.S. at 249-51, 104 S.Ct. at 1045-46. Section 5 means what it says: absent preclearance, a covered change may not be enforced.

Id. at 1481-82.

For the foregoing reasons, we conclude that laches should not bar the United States in the instant action.

VII. THE APPRORPRIATE REMEDY

In the instant case, the United States has requested an order enjoining the defendants from implementing the majority-vote requirement in mayoral elections until defendants obtain preclearance of the change. Our review of the Supreme Court's case law convinces us that the United States is entitled to the injunctive relief sought.

In *Clark v. Roemer,* 111 S.Ct. 2096, 2101 (1991), the Supreme Court reiterated the general rule: "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." The Court carefully distinguished the case before it—involving "the *ex ante* question whether to allow illegal elections to be held" —from a line of cases addressing the "*ex post* question whether to set aside illegal elections." *Id.* at 2102 (citing cases thus distinguished). The Court wrote:

> We need not decide today whether there are cases in which a district court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed. No such exigency exists here. The State of Louisiana failed to preclear these judgeships as required by § 5. It received official notice of the defect in July 1987, and yet three years later it had still failed to file for judicial preclearance, the 'basic mechanism" for preclearance. . . . The District Court should have enjoined the elections.

Id.

In the instant case, we have concluded that the change to majority voting is a covered change that has not been precleared according to the dictates of § 5. As in *Clark v. Roemer*, we are presented only with the question of *ex ante* injunctive relief.[21] And, as in *Clark v. Roemer*, we

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[21] For the purposes of clarity, we emphasize that the nature of the relief granted is entirely prospective: nothing we say here today should be understood to undermine the validity of actions taken by officials elected in the City of Monroe prior to this order. As the three-judge panel wrote in *Brooks v. State Board of Elections*, 775 F. Supp. 1470 (S.D. Ga. 1989), *aff'd*, 111 S.Ct. 288 (1990) (mem.):

> Section 5 contemplates injunctive relief, which is by its nature equitable. Moreover, the Supreme Court has indicated that the three-judge court has some limited discretion in fashioning a remedy by directing that the court must fashion an "appropriate" remedy. *See e.g., Perkins v. Matthews*, 400 U.S. 379, 441, 91 S.Ct. 431, 441, 27 L.Ed.2d 476 (1971) (question of appropriate remedy for district court); *cf., NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 183, 105 S.Ct. 1128, 1138, 84 L.Ed.2d 124 (1985) (discretion of district court).

find no "extreme circumstance" that might justify denial of such injunctive relief: the City's mayoral elections are scheduled for November of 1997; the Attorney General objected to the majority-vote requirement in 1991 and filed the instant suit in June of 1994. There is no "eve of the election" problem in this case.

Accordingly, an order will issue providing the injunctive relief requested.

> Thus, we must exercise our discretion in fashioning the appropriate remedy for the case at hand.
>
> As we discussed above, a three-judge court cannot rule that the covered changes have been "equitably precleared." At the other extreme, we are not required to rule . . . that the covered changes are void *ab initio*, retroactively rendering void any actions taken by a[n official] whose position is the result of a covered change that was not precleared. Granting such a remedy would . . . create genuine chaos.

Id. at 1482.

APPENDIX B

[Filed April 15, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 94-45-ATH (WDO)

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of the City of Monroe; MONROE CITY COUNCIL; RANDY PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J. ENSLEN, ROSEMARY B. MATHEWS, and LARRY WAYNE ADCOCK, Members of the Monroe City Council; SARA CAMPBELL, City Clerk,

Defendants.

ORDER

This matter is before the Court on the motion of the United States for summary judgment, pursuant to Rule 56, Federal Rules of Civil Procedure. Upon consideration of the motion, the memorandum and documents filed in support of that motion, and for the reasons set out in the Memorandum Opinion, it is this 15th day of April, 1997, hereby ORDERED that

The United States' motion for summary judgment is GRANTED.

It is FURTHER ORDERED that the defendants are permanently enjoined from further implementing the mapority vote requirement in mayoral elections unless and

until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is obtained.

/s/ R. Lanier Anderson
United States Circuit Judge

/s/ Duross Fitzpatrick
United States District Judge

/s/ Wilbur D. Owens, Jr.
United States District Judge

APPENDIX C

[Filed April 21, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Case No. 3:94-CV-45 (WDO)

UNITED STATES OF AMERICA,
Plaintiff,

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of the City of Monroe; MONROE CITY COUNCIL; RANDY PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J. ENSLEN, ROSEMARY B. MATHEWS and LARRY WAYNE ADCOCK, Members of the Monroe City Council;
SARA CAMPBELL, City Clerk
Defendant.

JUDGMENT

The Court by Order dated and filed April 15, 1997, having granted Plaintiff's Motion for Summary Judgment.

JUDGMENT is hereby entered in favor of Plaintiff, UNITED STATES OF AMERICA and against Defendants, CITY OF MONROE, GEORGIA; HARRY KNIGHT, mayor of the City of Monroe; MONROE CITY COUNCIL; RANDY PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J. ENSLEN, ROSEMARY B. MATHEWS, and LARRY WAYNE ADCOCK, Members of the Monroe City Council; SARA CAMPBELL, City Clerk.

Defendants are permanently enjoined from further implementing the majority vote requirement in Mayoral elections unless and until preclearance under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1937c, is obtained.

JUDGMENT ENTERED this 21st day of April, 1997.

GREGORY J. LEONARD
Clerk

By /s/ Zadie Peters
ZADIE PETERS
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action Nos.: 3:94-CV-45 (WDO)
and 94-45-ATH (WDO)

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF MONROE, GEORGIA; HARRY KNIGHT, Mayor of the City of Monroe; MONROE CITY COUNCIL; RANDY PEPPERS, JERRY SMITH, HUGH BOLTON, PHILLIP J. ENSLEN, ROSEMARY B. MATHEWS, and LARRY WAYNE ADOCK, Members of the Monroe City Council in their official capacities, SARA CAMPBELL, City Clerk,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that Defendants City of Monroe, Georgia; Harry Knight, Mayor of the City of Monroe; Monroe City Council; Randy Peppers, Jerry Smith, Hugh Bolton, Phillip J. Enslen, Rosemary B. Mathews, and Larry Wayne Adcock, members of the Monroe City Council; and Sara Campbell, City Clerk in the above case, hereby jointly appeal to the Supreme Court of the United States from the final Order and Judgment of the three judge panel (R. Lanier Anderson, Circuit Judge; Duross Fitzpatrick, Chief Judge; and Wilbur D. Owens, Jr., District Judge) in *United States of America vs. City of Monroe, et al.*, 3:94-CV-45 (WDO), Middle District of Georgia (April 21, 1997) granting injunctive relief to the

United States of America under § 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973(c)), he referenced Order was filed on April 15, 1997 and the Judgment was entered on April 21, 1997, in the United States District Court for the Middle District of Georgia. This appeal is filed pursuant to and inaccordance with 28 U.S.C. § 1253, 42 U.S.C. § 1973(c), and Rule 18 of the Rules of The Supreme Court of the United States.

This 21st day of May, 1997.

/s/ Upshaw C. Bentley, Jr.
UPSHAW C. BENTLEY, JR.
Georgia State Bar No.: 053000
J. EDWARD ALLEN
Georgia State Bar No.: 010950
MICHAEL C. DANIEL
Georgia State Bar No.: 204237
RICHARD L. FORD
Georgia State Bar No.: 268178
Attorneys for Defendants
FORTSON, BENTLEY & GRIFFIN, P.A.
P.O. Box 1744
Athens, Georgia 30603-1744
(706) 548-1151

APPENDIX E

STATUTORY PROVISIONS

42 U.S.C. § 1973.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973c.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force

or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declatory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the rights on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qalification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to faciltate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure

to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

APPENDIX F

[Filed July 29, 1976]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 75-67-ATH

ROBERT HOWARD, GRADY CROWLEY, *et al.*, on behalf of themselves and all others similarly situated,
Plaintiffs,

-v-

BOARD OF COMMISSIONERS OF WALTON COUNTY, GEORGIA, *et al.*,
Defendants.

OWENS, District Judge:

Before the court are the tasks of (1) resolving certain issues ancillary to the injunction granted by a three-judge court pursuant to section five of the Voting Rights Act, 42 U.S.C.A. § 1973c, against enforcement of several state laws governing elections in Walton County and the City of Monroe and (2) implementing interim election procedures until the challenged laws become effective upon compliance with section five or until further legislation is enacted for which approval required by section five is obtained.

THE BOARD OF COMMISSIONERS

Because [1970] Ga. Laws 2475 never became effective, the prior law which it purported to modify remains unchanged. *See* Pitts v. Busbee, 511 F.2d 126 (5th Cir. 1975). Thus, elections for the Walton County Board of

Commissioners are governed by [1939] Ga. Laws 765. That statute divides Walton County into four quadrants and provides for the election of one commissioner from each district so established, together with a commission chairman elected by the voters of the entire county. The four year terms of all members expire simultaneously.

The districts as they exist under the 1939 law do not meet the constitutional standard of substantial population equality, *e.g.*, Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1967); Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1459, 12 L.Ed.2d 506 (1974), and therefore the district lines must be redrawn. After carefully examining the evidence submitted by the plaintiffs and the Board of Commissioners, the court has determined that the plaintiffs' Plan P-1 is the most appropriate and that the districts for the election of four commissioners shall hereafter be as shown on the attached map of Walton County, Exhibit "A".

THE BOARD OF EDUCATION

With [1969] Ga. Laws 2054 rendered ineffective by said three-judge injunction, the applicable law governing the election of members of the Board of Education is found in [1968] Ga. Laws 2974. That law provides for the election of three members by voters residing in the City of Monroe and for the election of one member from each of four districts outside the city by the voters in each district. Members for posts 1, 3, 5, and 7 are elected in presidential election years; members for posts 2, 4, and 6 are elected in the intervening even year.

Under the 1968 districting scheme, 8,071 city voters are represented by three members of the Board, while the 13,372 voters in the remainder of the county, excluding one municipality with an independent school district, are represented by four members; there is thus presently one representative for each 2,690 city voters and one representative for each 3,343 county voters. With an ideal ratio of one representative for each 3,063 voters, there results a deviation from the ideal in the city of minus 12.2 percent and in the county of plus 9.1 percent. This total population deviation of 22.3 percent does not meet the "one man, one vote" standard of population equality. *See* Chapman v. Meier, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975).

This deviation cannot be cured without completely departing from the existing scheme.

Recognizing the necessity of devising an entirely new scheme to correct this population deviation, both the plaintiffs and the defendant Board of Education have submitted plans creating seven single-member election districts. After giving careful consideration to the submitted plans the court is of the opinion that the plaintiff's proposed plan is the better of the plans and does correct the deviation so as to satisfy the "one-man, one vote" rule. Members of the Board of Education shall be elected from seven single-member districts as shown on Exhibit "B". Candidates must reside in the district they seek to represent and only voters residing in each district shall elect the member from the district. As hereinafter stated all present members must stand for election this year. So as to conform to the terms of the present members, those elected this year from districts 1, 3, 5, and 7 will hold office from noon, January 2, 1977, for four years and the remainder from districts 2, 4, and 6 will hold office from the same date for two years and as to all until their successors are duly elected and qualified.

THE CITY OF MONROE

Because the City of Monroe in an unchallenged law conducts its election by an at-large system, [1964] Ga. Laws 205b, no redistricting or other remedy is required

as a result of the injunction against enforcement of the annexation ordinances increasing the population of the city. The issue concerning the city is whether a majority or plurality vote is required for the election of mayor and councilmen.

The 1971 city charter, [1971] Ga. Laws 3221, 3227, and an amendment to the predecessor charter, [1966] Ga. Laws 2458, provided for the election of the mayor and council by a majority vote. Both of these statutes having been declared unenforceable under section five, the remain-city charter is silent as to whether a plurality or majority vote is required. The parties agree that the city conducted plurality elections until enactment of [1966] Ga. Laws 2458.

Georgia's Municipal Election Code, Ga. Code Ann. § 34A-1407(a), provides:

> "If the municipal charter or ordinance as now existing or as amended subsequent to the effective date of this subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office."

Since neither the charter nor an ordinance of the City of Monroe now or ever has provided for a plurality election, this general law, which the parties have informed the court was approved by the Attorney General of the United States as required by section five, clearly applies here and requires election by majority vote. Plaintiffs' argument that the Monroe city charter must have provided for election by plurality vote because the city conducted elections on a plurality basis prior to the 1966 law is not persuasive. Such an interpretation would make a nullity of this general statute and void its obvious purpose of establishing an unambiguous rule for municipalities with charters lacking an express requirement.

INTERIM ELECTION PLAN

The persons presently serving as members of the Board of Commissioners and the Board of Education who were elected under unconstitutional schemes, are, of course, only *de facto* in office and under the equitable decree of this court are to remain so only until succeeded by officials elected pursuant to the plans and schemes herein created. *Paige* v. *Gray*, 399 F.Supp. 459 (M.D. Ga. 1975), *appeal docketed*, No. 75-3314, 5th Cir., August 28, 1975; *Tarpley* v. *Carr*, 204 Ga. 721, 51 S.E. 2d 638 (1949). Thus the present members of the Board of Commissioners, [1939] Ga. Laws 765, and of the Board of Education, [1968] Ga. Laws 2974, shall hold office until noon January 2, 1977, at which time they shall vacate and surrender their respective offices to their successors duly elected pursuant to the order of this court and the laws of Georgia not inconsistent with the orders in this case and properly qualified. Until that time, they possess and have the duty and responsibility of exercising all of the powers given them by state law not inconsistent with the orders in this case.

The procedures herein specified shall remain in effect until such time as different ones shall be prescribed by state law, duly enacted and submitted pursuant to the Voting Rights Act.

Primary elections for county commissioners and some members of the Board of Education are now scheduled to be held on August 10, 1976. The persons who are now running for those offices qualified pursuant to the schemes which this order now declares to each be unconstitutional. This order necessitates the election of all county commisioners and all members of the Board of Educa-

tion. For those elections to be conducted pursuant to the manner contemplated by the laws of this state, there must be a new qualifying period and another primary election, all of which because of the legally required time schedule must be conducted in addition to and after the now scheduled August 10, 1976, election. The court is preparing to fashion an order for a primary election and a run-off election, if required. Before doing so the court desires to receive the suggestions of the parties as to a time schedule for qualifying of candidates, conducting a primary election and holding a run-off primary election, if required. In submitting their suggestion the parties should bear in mind that the court intends to fashion a time schedule that will not interfere with the holding of the general election now scheduled for November 2, 1976. Let those suggestions be submitted within ten (10) days. *See* Page v. Gray, *supra*, at 466-68. In the meantime county commissioners and members of the Board of Education may not be elected on August 10, 1976.

SO ORDERED, this the 29th day of July 1976.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

do not desire to run in the delayed primary are entitled to a refund of their qualifying fee and those who do desire to run are entitled to be credited with the amount previously paid.

Persons eligible to vote in these delayed primary elections shall be those persons who are eligible to vote in the regular August 10, 1976, election.

Those person nominated in the delayed primary elections shall be candidates in the general election of November 2, 1976.

In all other respects the delayed primary elections shall be conducted in accordance with the laws of Georgia.

SO ORDERED, this the 5th day of August 1976.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

APPENDIX G

GEORGIA LEGAL SERVICES PROGRAMS
CENTRAL OFFICE
Suite 2121 • 101 Marietta Towers
Atlanta, Georgia 30303
(404) 656-6021
Gist 221-6021

August 12, 1976

Mr. Gerald Jones
Civil Rights Division
Department of Justice
Washington, D.C.

Dear Gerry:

I am sending you a copy of a recent Order in a Section V case here in Georgia, along with the Plaintiff's Brief. I have been talking to Dave Hunter about this issue, one of general importance to most of the municipalities in the State, and he suggested that I get in contact with you to get your opinion.

The problem involves those municipalities in Georgia whose charters did not expressly provide for either majority or plurality voting on November 1, 1964. A general State Act was passed in 1968 providing that municipalities would conduct their elections by majority vote unless their charters "provided for" the contrary. That Act was approved under Section V and is codified at Ga. Code Ann. Sec. 34A-1407(a). The problem involves those municipalities which had always used, as a matter of practice,

plurality voting prior to November 1, 1964, even though their charter was silent. We tried to argue in this case that, for a number of reasons, those charters should be construed to have "provided for" plurality elections on the November 1, 1964 date. Both for that state law reason and for Section V reasons, we then argued that such municipalities would have individual Section V approval before they could implement majority voting. The full explanation of our arguments is set out in the enclosed Brief, pages 3-4, and 9-13. In a ruling on July 29, 1976, which is enclosed, the Court rejected our arguments and held that the issue in such cities was controlled by the general state law from 1968 which had Justice approval. We are presently debating an appeal based on the same issues we briefly outlined in the trial court. They are a combined mix of state law and Section V law. I strongly question our chances of success on appeal. And even if we won on purely state law grounds, it would seem to me that the State Supreme Court could construe the state law differently and ignore the Fifth Circuit.

My question to you is whether the Department of Justice would have an interest in this case. If the Department, as the enforcer of Section V, agreed with our positions and would see fit to intervene in the case, our chances would be vastly improved in my opinion. Moreover, if you are in a position to make the kind of argument you are now raising with respect to the majority vote requirement for *county* elections, the entire case would be in a wholly different posture. That argument, however, would probably require refiling of a new case in the district court since we did not raise it.

I have already talked with Ms. Anita Kaake who provided valuable assistance. She did not feel, however, that we could raise the same kind of objections to the earlier Section V approval of this statute that are now being raised with respect to the county majority vote provision. After reading the Department's recent letter setting out your reasoning on that issue, I wondered if some of it

might still not be applicable to this situation. I could not determine that, of course, since I have not seen the correspondence between the State and the Department of Justice as to the 1968 City law.

In any event, I would appreciate hearing your opinion on the Department's position with respect to these various possible legal arguments on the municipal majority vote requirement. If there is a decision to appeal in this case, with Department of Justice assistance, we would of course have to know that very soon. Thus, I would appreciate your earliest reply.

Thank you for your consideration, and I will be looking forward to hearing from you.

Very truly yours,

/s/ David F. Walbert
DAVID W. WALBERT

DFW/bp